In the

Supreme Court of the United States

OCTOBER TERM, 1955

No. 881

HAROLD D. ROGERS
Petitioner

vs.

STATE OF CONNECTICUT
Respondent

STATEMENT OF THE CASE

In amplification of Petitioner's Statement certain uncontradicted facts, altogether independent of the confessions, are herein set forth.

On the very evening that Mrs. Kennedy was shot and killed during the robbery at her store, petitioner's nephew George Evans discovered that his revolver and cartridges were missing from a bedroom of his home. Petitioner had visited the Evans home that afternoon, and, for this reason particularly, Evans sought him out the following day and accused him of taking the gun. However, petitioner steadfastly denied the theft whereupon Evans and petitioner went to Police Headquarters and reported that the gun had been stolen by a person unknown (Record pp. 9-10).

On January 9, 1954, a robbery, theft and breaking and entering were perpetrated at the Travelers Hotel in New Haven for which

crimes the police arrested petitioner. In his possession at the time of his arrest was the stolen Evans revolver. Upon being questioned by the police, petitioner at first maintained that he had won the gun in a "crap game" that afternoon. However, in further questioning the following day, he admitted having stolen the gun from his nephew's home on the afternoon of the Kennedy murder. In the meantime in an effort to conceal the identity of the gun, petitioner had filed its serial numbers (Record p. 10).

The murder remained unsolved until January 30, 1954, when ballistics tests by the State Police established that the revolver taken from petitioner had fired the bullets which killed Mrs. Kennedy (Record p. 10).

REASONS AGAINST REVIEW BY THIS COURT

1. The issues raised here were fairly and fully tried and reviewed in the Court below.

2. The undisputed facts of this case do not indicate the use of incorrect constitutional standards of judgment as heretofore set forth by this Court.

3. No right guaranteed by the Due Process Clause of the Fourteenth Amendment was violated in the procurement and use of the confessions.

4. The use of the confessions obtained under the circumstances of this case is by no means repugnant to "that fundamental fairness essential to the very concept of justice." *Lisenba* vs. *Calif.*, 314 U. S. 219, 236 (1941).

5. No substantial constitutional question is presented here.

ARGUMENT

I

TWO COURTS AND A JURY DETERMINED THAT THE CONFESSIONS WERE MADE FREELY AND VOLUNTARILY

On motion of petitioner, the Trial Court in the absence of the Jury heard evidence at great length as to the circumstances surrounding these confessions. Thereafter in ruling the confessions freely and voluntarily made, the Court made two Findings of facts (Record pp. 38-42; 42-45). In the course of the trial the Jury passed upon these same claims and circumstances and by its verdict found that the confessions were not adversely affected thereby. The issue was again presented to the Supreme Court of Errors and there for the third time was determined adversely to petitioner's contentions. A criminal prosecution thus approved by the state should not be set aside as violative of due process without clear proof that such drastic action is required to protect Federal constitutional rights. *Gallegos* vs. *Nebraska*, 342 U. S. 55, 60 (1951).

We submit that there is here no such clear proof. On the contrary, it is amply evident that there were present no such circumstances as have led this Court to hold in certain cases that convictions upon the basis of forced confessions were in violation of the Due Process Clause of the Fourteenth Amendment. The evidence here is not such as to impel this Court to "set aside the findings of two courts and a jury and adjudge that the admission of these confessions was so fundamentally unfair, so contrary to the concept of ordered liberty, as to amount to deprivation of due process." *Lisenba* vs. *Calif.*, supra at p. 238.

II

THE CONFESSIONS WERE NOT PROCURED THROUGH COERCION

Petitioner does not so much as suggest that the action of any officer before or during the making of either confession was accompained by force or by the threat of force. As to his confession to the Coroner (Exhibit WW) petitioner makes no claim of coercion, either physical or psychological. His sole contention on this point relates to his confession to the police (Exhibit VV) which he asserts resulted from psychological pressure by prolonged interrogation while handcuffed and by a threat to take petitioner's wife in custody.

His claim of protracted questioning while handcuffed finds no support in the evidence and is directly contrary to the finding of facts made by the Court (Record pp. 40-45). The Court found that although petitioner was at the State's Attorney's office from shortly after noon until about midnight, the questioning was never continuous or extended; there were delays, recesses and interruptions; the treatment accorded petitioner was considerate; he was at all times seated with his handcuffs released; at intervals in the afternoon and evening food, coffee and cigarettes were given to him; petitioner is highly intelligent; he had experienced previous arrests and interrogations by the police and was not adversely affected by the treatment accorded him on this occasion. When petitioner indicated his readiness to make a statement, an official Court Reporter was summoned and a stenographic record of the confession was made. Following this confession, the petitioner was not again questioned until late the following afternoon, some seventeen hours later, when he appeared before the Coroner at a formal inquest. On this occasion the entire interrogation was concluded within one and one-half hours (Record pp. 43-44). Thus, it is seen that petitioner's entire argument on

this point is based upon an assumption of facts diametrically opposed to those found by the Court. His argument accordingly must fall, for it is only on uncontroverted facts that the issue of Federal due process is to be considered. *Gallegos* vs. *Nebraska*, supra at p. 62.

Similarly, petitioner's claim that a "threat to take his wife into custody" coerced his first confession is also a departure from the facts found by the Court. The announced purpose of the officers was merely to question his wife as to any knowledge she might have bearing upon the murder (Record p. 40). This can hardly be classed as a threat or as such a threat as would coerce a confession or render it involuntary. Just as the hope of benefit influencing a confession so as to render it involuntary must relate to the particular crime confessed, so also a threat must have a direct and immediate relation in order to invalidate the confession. Cf. *Henson* vs. *State*, 159 Tex. Cr. 647, 652; 266 S. W. 2d, 864 (1953). *State* vs. *Beard*, 16 N. J. 50, 56; 106 A 2d 265 (1954).

The Court properly found that this pretense of placing a telephone call for the wife had such collateral and remote connection as not to taint the confession with a probability of untruth (Record p. 41) Cf. *State* vs. *Malm*, 142 Conn. 112, 121. And in any event Connecticut courts hold that a trick which has no tendency to produce a confession except one in accordance with truth is always admissible. *State* vs. *Palko*, 121 Conn. 669, 680.

Alone or together, neither illegal detention nor deceit by the police would suffice to vitiate a confession as unconstitutionally obtained. *U. S. ex rel. Caminito* vs. *Murphy*, 222 F. 2d 698, 700 (1955).

We submit that the interrogation of petitioner under these circumstances was at all times within reasonable limits. It was wholly free from those objectionable features usually referred to as third degree methods. Throughout there was a complete

absence of conduct calculated to overpower petitioner's resistance. Accordingly, the Court below quite properly found that there was neither physical nor psychological coercion. *Stein* vs. *N. Y.*, 346 U. S. 156, 184 (1951). Where there is a dispute as to whether the facts which are charged to be coercive actually occurred, or where different inferences may be drawn from the admitted facts, the appellant tribunal is not to interfere even though it might on an original appraisal have come to a contrary conclusion.

Lyons vs. *Okla.*, 322 U. S. 596, 602 (1944).
Lisenba vs. *Calif.*, supra at p. 238.

Although petitioner makes no claim that any of these elements of prolonged interrogation, of being handcuffed, or of threats to summon his wife, actually attended his confession to the Coroner, he takes a position that these occurrences of the preceding day carried over and infected his second confession also. However, since the Court found that these elements were not present on the day of the first confession, they obviously could have had no effect upon the second confession. And in any event a confession otherwise voluntary is not affected by the fact that a previous one was obtained by improper influences, if it is shown that those influences were not operating when the later confession was made. *State* vs. *Willis*, 71 Conn. 293, 313. *Lyons* vs. *Oklahoma*, supra at p. 603. The burden of showing essential unfairness in a state court is upon him who claims such injustice and seeks to have the result set aside, and this burden must be sustained not as a matter of speculation but as demonstrable reality. *Adams* vs. *U. S. ex rel. McCann*, 317 U. S. 269, 281 (1942). Petitioner here has failed utterly to sustain this burden.

III

THERE WAS NO DENIAL OF COUNSEL TO PETITIONER

The short answer to this claim is that there was no refusal of counsel to petitioner. The Trial Court specifically found that petitioner at no time requested counsel before or during his confession to the police (Record p. 41). Moreover on the day following this first confession, petitioner made no request that his attorney be called to the jail, Opinion below, 143 Conn. 167, 174. (Petitioner's Appendix A, p. 21.) That he had no desire for counsel is further demonstrated in his confession to the Coroner. There, at the very outset of the interrogation, he expressly elected to proceed without counsel notwithstanding that he was specifically instructed as to his right to counsel as well as his right to refuse to testify altogether (Record p. 44).

Even if these were not the facts, the denial of counsel during interrogation by police or coroner would not constitute a violation of due process. *Stroble* vs. *California,* 343 U. S. 181, 196 (1952). See also *State* vs. *Cross, 72* Conn. *722, 728.* This Court has repeatedly held that the Fourteenth Amendment does not bind state courts to exclude a confession because, without coercion, it was obtained while prisoner was uncounselled and illegally detained. *Stein* vs. *N. Y.,* supra at p. 188. *Lisenba* vs. *California,* supra at p. 240.

The test of admissibility is whether the confession was voluntary and not whether the accused was well advised. *State* vs. *Palko,* supra at p. 680. Obviously, a confession is not rendered involuntary merely by reason of the absence of counsel. Particularly where a defendant has had considerable prior experience wtih criminal investigations, as is true of this petitioner, the denial of counsel and confession while held incommunicado does

not work fundamental unfairness. *Boyden* vs. *Webb*, 208 F 2d 201, 204 (1953).

The right to counsel which petitioner herein asserts so vehemently is one which arises only upon the arraignment of prisoner. *Hawk* vs. *Olson*, 326 U. S. 271, 278 (1945). Lack of counsel prior to trial does not constitute a denial of justice. *Gallegos* vs. *Nebraska*, supra at p. 65. No claim is made here that there was any interference with petitioner's right to counsel at all times subsequent to the Coroner's hearing on January 31st so that ample opportunity for consultation and preparation was available to petitioner as specified in *Powell* vs. *Alabama*, 287 U. S. 45, 59 (1932).

IV

AS TO ILLEGAL DETENTION

It should be noted that at the time of making both his confessions, petitioner was being held on lawful process relating to other charges. Upon receiving the ballistics report, the investigators concededly might have questioned him at the Jail. Instead, they procured his delivery to the State's Attorney's office on written request to the Jailer rather than by court order. As to his confession to the Coroner the following day, petitioner's presence could have been procured by subpoena. *State* vs. *Buteau*, 136 Conn. 113, 121. Instead, his appearance was produced by a telephone call from the Coroner to the Jailer.

Since petitioner was wholly unaware of the method used to present him on either of these occasions, the irregularity obviously had no impact on him and his confessions cannot be deemed to be tainted thereby (Record pp. 42, 44). Yet petitioner contends that because his removal to the State's Attorney's office was without specific court authorization and because the Coroner dispensed with a formal subpoena, his confessions thereby become

involuntary as a matter of law quite apart from whether they were involuntary as a matter of fact.

Petitioner concedes that the McNabb rule has no application in State courts; but even in Federal jurisdictions where it does apply, the McNabb doctrine does not preclude police examination of a prisoner lawfully arrested and held on other charges.

Palakiko vs. *Harper, Warden*, 209 F 2d 75, 94 (C. A. 9, 1953) cert. den. 347 U. S. 956, 979 (1953).

U. S. vs. *Carignan*, 342 U. S. 36, 45 (1951).

In both the Palakiko and Carignan cases the prisoners were removed from jail, without court order, for questioning which resulted in confessions. This Court there pointed out that constitutional requirements do not forbid such private examination of persons in lawful custody. *U. S.* vs. *Carignan*, supra at 39.

Particularly with a prisoner experienced in the ways of crime and its detection, as was this petitioner, it is difficult to see how interrogation at the jail or his removal by court order or subpoena would have made any difference. The places in which the confessions were given or the means by which he was brought to those places had nothing whatever to do with the giving of the confessions. *Palakiko* vs. *Harper, Warden*, supra at 94.

Under the law of Connecticut, a voluntary confession is not to be excluded because of any illegality in the accused's situation at the time of making it, and a confession if otherwise admissible, cannot be rejected for the reason that the accused was in custody on invalid process or without any process or legal right.

State vs. *Zukauskas*, 132 Conn. 450, 458.

State vs. *Buteau*, 136 Conn. 113, 123.

State vs. *Guastamacchio*, 137 Conn. 179, 183.

This Court, too, recognizes that evidence obtained by illegal means may not void state convictions and the Fourteenth Amend-

ment does not prohibit a state from such detention and inter rogation of a suspect as under the circumstances appears reason able and not coercive. *Stein* vs. *N. Y.*, supra at 192. This i not one of the cases where the "sphere of superintendence (of thi Court) should . . . extend to state police activities." *U. S* vs. *Murphy*, supra at p. 706.

CONCLUSION

This petition for certiorari does not present sufficient substance or merit to warrant review by this Court. There was no denial of due process of law in the procuring or use of petitioner's confessions.

It is therefore respectfully submitted that this case is not a proper one for review by certiorari in this Court, and that the petition for a writ of certiorari ought to be denied.

Dated May 10, 1956.

ABRAHAM S. ULLMAN,
ARTHUR T. GORMAN,
Counsel for Respondent.

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HAROLD D. ROGERS,
Petitioner
vs.
STATE OF CONNECTICUT,
Respondent

Supplemental Brief in Support of the Petition for a Writ of Certiorari to the Supreme Court of Errors of the State of Connecticut

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I. PETITIONER'S REQUEST FOR COUNSEL AT THE STATE'S ATTORNEY'S OFFICE

Respondent relies on the trial court finding that "The accused did not at any time on the day of the questioning request the presence or assistance of an attorney" (Record p. 41) to refute petitioner's assertion that he asked for counsel. As pointed out in the Petition (at p. 4), Rogers testified that he asked for counsel about an hour after his arrival at about 1 P. M. at the State's Attorney's office. This testimony was uncontradicted. Rogers testified that two detectives were present when he requested counsel. (Petitioner's Appendix B, p. 41.) Neither of these detectives were called by the State to testify.

The trial court finding was obviously based on Assistant Chief Eagan's testimony, the only other testimony on this point at the trial. However, Eagan by his own testimony (1) did not arrive at the State's Attorney's office until 8 P. M. (Petitioner's Appendix B, p. 30) and (2) did not testify about the period before he arrived. (Petitioner's Appendix B, p. 37.)

Therefore, Rogers' testimony as to the happenings from about 1 P. M. to 8 P. M. was clearly uncontradicted in regard to his request for counsel. Petitioner does not rely on any testimony which was contradicted by Eagan as to the events after 8 P. M., but solely on the uncontradicted testimony of Rogers which the State did not elect to challenge with the available detectives.

On review, the majority opinion of the Supreme Court of Errors did not accept or reject the trial court finding on the request for counsel, but considered, arguendo, that Rogers was denied counsel at the State's Attorney's office (Petitioner's Appendix A, p. 21), and the dissent stated conclusively, "Upon arriving there, he was told for the first time that he was to be questioned about the death of Mrs. Kennedy. He immediately asked to see his lawyer. Not only was this request refused but he was thereafter subjected to a prolonged interrogation from

approximately 1 P. M. until the early morning hours of the following day." (Petitioner's Appendix A, p. 26.)

In connection with the right to counsel argument, respondent infers from his use of *Hawk* v. *Olson*, 326 U. S. 271 (1945) (Respondent's Reply Brief p. 8), that the events of January 30 and 31, 1954, were prior to Rogers' arraignment. It is necessary, therefore, to emphasize again that Rogers had been arraigned on January 13, 1954, in the City Court of New Haven on the charge of attempted robbery while armed, breaking and entering, theft, and carrying a revolver in a motor vehicle (Record p. 39).

II. AS TO THE HANDCUFFS

Respondent states "he (Rogers) was at all times seated with his handcuffs released" (Respondent's Reply Brief, p. 4), apparently relying on the trial court finding at page 40 of the Record. Here again, however, Rogers' testimony (Petition p. 4) is uncontradicted as to events before 8 P. M. As to events after 8 P. M. the trial court's finding and Assistant Chief Eagan's testimony indicate that at least one wrist was in a handcuff at all times (Record p. 40; Petitioner's Appendix B, p. 36; Appendix C, p. 67). Therefore, there is no basis for respondent's statement that "he was at all times seated with his handcuffs released."

III. AS TO THE THREATS TO TAKE PETITIONER'S WIFE INTO CUSTODY

In attacking the significance of the admittedly faked-phone calls (Petitioner's Apperndix B, p. 34) in regard to bringing in Rogers sick wife and family, respondent states that "the announced purpose of the officers was merely to question the wife as to any knowledge she might have bearing upon the murder," and that "The Court properly found that this pretense—of placing a telephone call for the wife had such collateral and remote connection as not to taint the confession with probability of untruth." (Respondent's Reply Brief, p. 5.)

Respondent makes no explanation of how the officer's "announced purpose" to bring in the wife was to be effectuated when the police officer actually talked to no one. The respondent also ignores its police officer's testimony that the purpose of the faked call was to impress Rogers with the advisability of giving a statement which the officer was requesting (Petitioner's Appendix, p. 34).

More important, however, respondent ignores the uncontradicted testimony of Eagan and Rogers on this point. This testimony clearly demonstrates the relation between the faked calls and the confession:

> "Q. (cross-examination of Eagan): And he continued to deny any involvement in the case until after the fake telephone call with regard to his wife. Is that correct? A. Well, I say there was an hour's difference between the time I made the call and the time he started to talk.
>
> "Q. That I understand, but that was after he— A. Oh, that is after, yes, after the call.
>
> "Q. And after you had told him about these ballistic reports he still maintained his denial until after the call to Mrs. Rogers? Right? A. Yes." (Petitioner's Appendix B, p. 38.)

> "Q. (direct examination of Rogers): And what happened after Chief Eagan arrived? A. He said he was going to check my wife up and have her come down and have the two children and he picked up the telephone. I thought he was telephoning. He was talking to Headquarters. Said 'Get a squad car ready to pick up Mrs. Rogers and have the matron pick up the two children and take them some place and keep them over night. Well, bring her down there for questioning, keep her down there over night if necessary.' . . . . (Disputed testimony here omitted.)

"Q. Did he say anything about holding it up for an hour? A. Yes, he said he would give me an hour, indirectly. He didn't say exactly that, indirectly, he didn't exactly say. He told them over the phone to hold that car for an hour and he could call up and tell them directly when to send for her, gave me the impression he gave me an hour to confess.

"Q. Is that the reason you gave him this statement? A. That's right." (Petitioner's Appendix B, pp. 42, 43.)

"Q. (cross-examination of Rogers) : Did you use the whole hour to consider whether you were to confess? A. That's right.

"Q. You used the whole hour? A. That's right.

"Q. And at the end of that hour, after that hour's consideration, he went to the telephone, picked up the phone, and was it then that you made the confession? A. That's right.

"Q. And that was because of what he said to you about your wife? A. That's right.

"Q. Coming down? A. That's right." (Petitoner's Appendix B. p. 43.)

The opinion of the court below gives no credence to the "announced purpose" argument respondent raises by labeling the call a "pretended" one (Petitioner's Appendix A, p. 21). The dissenting opinion stated, "Only after the police had *threatened* to take his sick wife into custody and to turn his and his wife's foster children over to the juvenile authorities, and had pretended to make two telephone calls to put that *threat* into effect, did the defendant reverse his previous persistent denials and involve himself in the killing of Mrs. Kennedy." (Emphasis added.) (Petitioner's Appendix A, p. 26.)

CONCLUSION

The facts set forth here and in petitioner's statement of the case (Petition, p. 3) are based entirely on uncontroverted or conceded facts and are, therefore, undisputed facts for purposes of review by this Court. On the basis of these facts, it is respectfully submitted that the Petition for a Writ of Certiorari be granted so that petitioner is not deprived of his life without due process of law.

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